



April 29, 2019

FOIA Officer
U.S. Fish and Wildlife Service Midwest Region
5600 American Blvd. West, Suite 990
Bloomington, MN 55437-1458
Phone: 612-713-5360 Email: MidwestNews@fws.gov

VIA Electronic Mail and U.S. Mail

**Re: Freedom of Information Act Request – Ameren Corporation's Labadie Power Station
Endangered Species Take Information**

To whom it concerns:

I am writing on behalf of the Sierra Club to request the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), concerning the Ameren Corporation's Labadie Power Station in Missouri (hereinafter "Labadie").

Sierra Club is the nation's oldest grassroots organization. It has 3.5 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of industrial discharges of air and water pollutants, development of natural resources, the use of fossil fuels, and the impacts of industrial operations on land, water, and fish and wildlife. Sierra Club conducts multiple public campaigns around these issues, including educating the public about the environmental impacts of power plants such as those addressed in this request. This request is made on behalf of those education campaigns, as well as the organization's long-standing interest in government accountability and transparency.

We are submitting this request to obtain certain records relating to the Labadie plant's impacts on sensitive, threatened and endangered species, including but not limited to the pallid sturgeon.

Definitions

The terms "records" and "documents" mean information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing is included in this request if they are in the possession of or otherwise under the control of the Marine Fisheries Service (NMFS) (hereinafter "the Service.")

The term "take" is used as defined in the Endangered Species Act (ESA) at 16 U.S.C. § 1532(19), and applicable regulations, e.g. to harass, harm, capture, trap, or kill said species, including direct and indirect impacts to their habitat. See, 50 C.F.R. § 17.3 and 50 C.F.R. § 402.02.

Records Requested

Any monitoring data or other records pertaining to the impingement or entrainment of threatened or endangered species, including but not limited to the pallid sturgeon. In addition, any permits issued to the Ameren plant for the "take" of any threatened or endangered species, including but not limited to the pallid sturgeon; and any documents concerning such actual or potential take by the plant.

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the agency must include the following information:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club.

Fee Waiver Request

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.17(a). The Sierra Club has spent years promoting the public interest through the development of policies that provide enhanced environmental protection and has routinely received fee waivers under FOIA.

The Sierra Club is a national, non-profit, environmental organization with no commercial interest in obtaining the requested information. National Sierra Club members are concerned with the protection of endangered species and their habitats. Thus, our organization intends to use the requested information to inform the public and our members so that they can meaningfully participate in protecting the nation's natural resources.

As explained more fully below, the above referenced FOIA request satisfies the fee waiver criteria, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(iii).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly states that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. This is such a case.

The records requested here pertain to whether or not Labadie operations are impacting sensitive, threatened, or endangered species, including whether it has been granted incidental take permits under the MMPA and ESA. The Service are responsible for ensuring that actions that Federal agencies authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. These requested records thus directly concern “identifiable operations or activities of the government.”

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not in the public domain. The requested records are “likely to contribute” to an understanding of whether and how the Service grant incidental take permits to power plants, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of the CWA and the implementation thereof.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—including (1) expertise in the subject area of the request and ability and (2) intention to disseminate the information to the public—is examined.

The Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically the implementation of environmental laws. One of the Sierra Club's current national conservation campaigns focuses on establishing a legacy for future generation by

advocating for the permanent protection of our public lands and waters.¹ The Sierra Club is familiar with the power plants and the damage they can cause to fish and wildlife species by way of take, and the efforts of viable permits to mitigate these damages.

The Sierra Club also has the ability and intention to disseminate the information it receives through FOIA. The information is disseminated through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, emailing and list serve distribution to our members, and posting on the Club's website. Each month, the Sierra Club website receives approximately 850,000 visits. Sierra Magazine, which is published bimonthly by the Sierra Club, reaches more than a million people across North America. Sierra Club Insider, our e-newsletter, is sent to over a million people twice a month. In addition, Sierra Club disseminates information obtained through FOIA through comments to administrative agencies, and when necessary, through the judicial system. The Sierra Club has already published, posted, and disseminated information on this topic.²

Thus, Sierra Club unquestionably has the "specialized knowledge" to address the issues; the "ability and intention" to disseminate the information requested; and to do so in a manner that contributes to the understanding of the "public-at-large."

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no publicly available information regarding any ESA permits authorized by the Service to Labadie. No permit was published in the Federal Register or anywhere else. It remains unclear whether or not Labadie has incidental take authorization for the aforementioned species, particularly those that have a critical habitat that overlaps with this facility. The public can only participate in protecting endangered species and their habitats to the extent the public has a clear understanding of issues such as the granting of permits or lack thereof. Thus, the records requested will contribute significantly to the public understanding of the state and federal government's roles in protecting the nation's waters through the CWA, and ESA programs.

5. The requester must not have a commercial interest that would be furthered by the requested disclosure.

The Sierra Club is a non-profit organization and has no commercial interest in the requested records. Nor does the Club have any intention of using these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Sierra Club is a tax-exempt organization under section 501(c)(3) and 501(c)(4) of the Internal Revenue Code. The requested records will be used for the furtherance of the Club's educational mission to inform the public on matters of vital importance to the environment, wildlife, and natural resources.

¹ <https://content.sierraclub.org/ourwildamerica/protecting-lands-wildlife-and-waters>

² See, *Giant Fish Blenders: How Power Plants Kill Fish & Damage Our Waterways (And What Can Be Done to Stop Them)*, Sierra Club (July 2011), <https://vault.sierraclub.org/pressroom/media/2011/2011-08-fish-blenders.pdf>

6. If the requester does have a commercial interest, the fee waiver must not be granted unless the public interest in disclosure outweighs the requester's commercial interest.

As noted above, the Sierra Club has no commercial interest in the requested records. Therefore, this item is not applicable. If any commercial interest was present, however, it would be outweighed by the public interest in disclosure of the information sought.

For the aforementioned reasons, the Sierra Club qualifies for a fee waiver, and the Service should waive processing and copying fees for this FOIA request.

If the Service do not agree to this fee waiver request, then we request that you contact us before incurring any copying or production fees.

Record Delivery

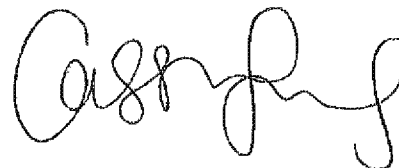
We request that the Service, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA, 5 U.S.C. § 552, (a)(6)(A)(i). Please produce the forthcoming records, as noted above, as they are received by the Service. Please produce the requested records on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Please mail hard copies or email electronic versions of all requested records as soon as possible to:

Cassidy Lang
Sierra Club
1650 38th Street, Suite 102W
Boulder, CO 80301
[*cassidy.lang@sierraclub.org*](mailto:cassidy.lang@sierraclub.org)

If you find that this request is unclear in any way, please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (303) 449-5595 ext. 104.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cassidy Lang', written in a cursive style.

Cassidy Lang
Sierra Club, Legal Assistant